

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA FITZGERALD, et al.

v.

LILLIAN VOGEL, et al.

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CIVIL No. 02-7849

O'Neill, J.

January , 2003

MEMORANDUM

I. INTRODUCTION

In this action, plaintiffs allege that defendants have violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (a), (b), (c) and (d).¹ Plaintiffs also assert a number of state law claims. Defendants now move, *inter alia*, for dismissal for lack of subject matter

¹ The Court of Appeals for the Third Circuit has explained the statutory framework for asserting civil RICO claims:

The RICO statute authorizes civil suits by “[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962].” 18 U.S.C. § 1964(c) (1988). Section 1962 contains four separate subsections, each addressing a different problem. Section 1962(a) prohibits “any person who has received any income derived . . . from a pattern of racketeering activity” from using that money to acquire, establish or operate any enterprise that affects interstate commerce. Section 1962(b) prohibits any person from acquiring or maintaining an interest in, or controlling any such enterprise “through a pattern of racketeering activity.” Section 1962(c) prohibits any person employed by or associated with an enterprise affecting interstate commerce from “conduct[ing] or participat[ing] . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity.” Finally, section 1962(d) prohibits any person from “conspir[ing] to violate any of the provisions of subsections (a), (b), or (c).”

Kebr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1411 (3d Cir. 1991).

jurisdiction and improper venue or in the alternative for transfer to the District of New Jersey.²

For the reasons stated below, I will deny defendants' motion to dismiss but I will transfer the action to the District of New Jersey.

II. BACKGROUND

Plaintiffs' First Amended Complaint and RICO Case Statement describe a condominium board of trustees plagued by internal disputes and factionalism. The California Villas Condominium Association ("CVCA") is a property located in Atlantic City, New Jersey. The parties to this dispute consist of board members and condominium owners who either support or oppose Lillian Vogel, whom plaintiffs describe as the "self-appointed president of the CVCA."³ Plaintiffs assert a host of federal and state claims against Vogel and her associates, varying from use of the mails to commit condominium board "election fraud" to simple breach of contract. Two of the defendants reside in Pennsylvania, one in New York, and ten in New Jersey. From the complaint it appears that the overwhelming majority of alleged violations occurred in New Jersey. Although plaintiffs' voluminous complaint does not lend itself to concise summarization, plaintiffs' RICO claims essentially stem from an alleged pattern of mail and wire fraud through which Vogel and her associates billed the CVCA and its owners for incomplete and shoddy work done in and around the condominium complex and committed condominium election fraud.

² Defendants also move for dismissal based on lack of personal jurisdiction and failure to state a claim. Additionally defendants ask that I abstain. I will consider only the issues of subject matter jurisdiction and venue.

³ There is also one corporate defendant, Personal Touch, that plaintiffs allege participated in the RICO activities.

III. DISCUSSION

A. Subject Matter Jurisdiction

Because defendants have moved pursuant to Federal Rule of civil Procedure 12(b)(1) to dismiss, as a preliminary matter I must examine whether this Court has subject matter jurisdiction. See 15 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3827 (2d ed. 1986) (“A court may not order a transfer under § 1406(a) unless the court has jurisdiction of the subject matter of the action.”); see also Leroy v. Great Western United Corp., 443 U.S. 173, 180 (1979) (“[N]either personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties.”).

A motion under Rule 12(b)(1) may be treated as either a facial attack on the complaint as in the present case or a factual challenge to the court's subject matter jurisdiction. Gould Electronics Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000).⁴ A court reviewing a facial attack may consider only the allegations of the complaint and any documents referenced therein

⁴ Defendants do not appear to challenge to the existence of an underlying fact which would confer subject matter jurisdiction upon this Court, such as an insufficient amount of damages in controversy as in a diversity suit. See Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc., 227 F.3d 62, 69 (3d Cir. 2000) (noting that an attack on subject matter jurisdiction “in fact” means defendants dispute existence of certain jurisdictional facts alleged by the plaintiffs.). Instead, defendants blend a Rule 12(b)(6) attack on the sufficiency of the complaint with their Rule 12(b)(1) motion for lack of subject matter jurisdiction. See Gould, 220 F.3d at 178 (“[The Court of Appeals] has previously cautioned against treating a Rule 12(b)(1) motion as a Rule 12(b)(6) motion and reaching the merits of the claims.”). I do not pass judgment on the merits of defendants’ Rule 12(b)(6) motion and leave that question to the District Court for the District of New Jersey. See Bell v. Hood, 327 U.S. 678, 682 (1946) (“[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.”).

or attached thereto in the light most favorable to the plaintiff. Id. Although plaintiff bears the burden of persuasion when subject matter jurisdiction is challenged, the legal standard for surviving a Rule 12(b)(1) motion is a low one. Kehr Packages, 926 F.2d at 1409. The Court of Appeals has recognized that: “A claim may be dismissed under Rule 12(b)(1) only if it ‘clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction’ or is ‘wholly insubstantial and frivolous.’” Id. at 178. “Moreover, dismissal for lack of jurisdiction is not appropriate merely because the legal theory alleged is probably false, but only because the right claimed is ‘so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.’” Kulick v. Pocono Downs Racing Ass'n, 816 F.2d 895, 899 (3d Cir.1987), quoting Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666 (1974).

At this stage of litigation, I cannot conclude that all of plaintiffs’ claims are so devoid of merit as to rob this Court of subject matter jurisdiction. Plaintiffs assert that this Court has federal question jurisdiction under 28 U.S.C. § 1331, which provides that “district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” The federal statute that plaintiffs invoke in their complaint is 18 U.S.C. § 1964(c):

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.

Plaintiffs contend that defendants committed violations under 18 U.S.C. §§ 1962 (a), (b), (c) and

(d).

Defendants assert that plaintiffs' RICO claims are nothing more than a pretext for conferring subject matter jurisdiction upon this Court to hear what essentially constitute simple state law fraud claims. In addition, defendants contend that civil RICO was enacted by Congress to "prevent 'Soprano-like' interstate mob activity, not garden variety disputes among local condominium owners." (Def. Vogel's Mem. at 15.)

The Supreme Court has recognized that RICO is to be interpreted broadly:

This less restrictive reading is amply supported by our prior cases and the general principles surrounding this statute. RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub.L. 91-452, § 904(a), 84 Stat. 947. The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity.

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 497-98 (1985); see also Annulli v. Panikkar, 200 F.3d 189, 195 (3d Cir.1999).⁵

In the present case, plaintiffs allege that their property was injured through a pattern of racketeering consisting mainly of the predicate acts of mail and wire fraud. Although a court may find plaintiffs' allegations insufficient to defeat defendants' Rule 12(b)(6) motion I cannot conclude at this point in the litigation that plaintiffs' claims are frivolous or utterly without merit. See Gould, 220 F.3d at 178 ("[The Court of Appeals] has previously cautioned against treating a Rule 12(b)(1) motion as a Rule 12(b)(6) motion and reaching the merits of the claims. This concern arises because the standard for surviving a Rule 12(b)(1) motion is lower than that for a

⁵ In Forbes v. Eagleson, 228 F.3d 471, 484 (3d Cir. 2000), the Court of Appeals recognized that Rotella v. Wood, 528 U.S. 549 (2000) rejected the "injury and pattern discovery" rule applied in Annulli.

Rule 12(b)(6) motion.”).

B. Venue

“Once the defendant has raised the defense of improper venue, the plaintiff bears the burden of proving that venue is proper.” Shuman v. Computer Associates Intern., Inc., 762 F. Supp. 114, 115 (E.D. Pa. 1991) (Waldman, J.). Moreover, “venue must be properly laid as to each defendant. The mere fact that some alleged co-conspirators may have engaged in conduct in furtherance of the conspiracy within this district, does not properly establish venue as to all other co-conspirators.” Eaby v. Richmond, 561 F. Supp. 131, 140 n.2 (E.D. Pa. 1983) (Troutman, J.).

Defendants argue that under the general venue statute, 28 U.S.C. § 1391(b),⁶ plaintiffs cannot maintain venue in this district because that all defendants do not reside here, most of the alleged violations occurred in New Jersey, and that subsection (3) of §1391(b) is not applicable because venue is proper for all defendants in the District of New Jersey.

Plaintiffs apparently concede that venue does not lie under 28 U.S.C. § 1391(b); however, they assert that the RICO venue provisions⁷ permit a plaintiff to sue in any district in which a

⁶Title 28 U.S.C. § 1391(b) provides:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

⁷ Title 18 U.S.C. § 1965 provides:

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in

defendant resides, is found, has an agent, or transacts his affairs. 18 U.S.C. § 1965(a). In addition, plaintiffs argue that I can bring the non-Pennsylvania defendants before this Court because under 18 U.S.C. § 1965(b) district courts have discretion to summon and serve process upon residents from other districts who do not meet the venue requirements of 18 U.S.C. § 1965(a) so long as “the ends of justice” justify such action. Plaintiffs contend that the ends of justice require bringing the non-Pennsylvania residents into this district because judicial economy requires that all defendants should be party to only one action and most of the defendants, who live in Atlantic City, will not be inconvenienced by an hour’s ride to the federal courthouse in Philadelphia.⁸

In my view, plaintiffs’ arguments are not sufficient to justify an exercise of my discretion under section 1965(b). Section 1965(a) is sufficient to provide venue for Pennsylvania defendants Lillian Vogel and Al Seltzer. However, while judicial economy is a valid goal, such a goal would be better served in a single action in New Jersey where venue will be proper for all defendants because the CVCA, the property out of which plaintiffs’ claims arose, is located there. See 28 U.S.C. § 1391(b)(2) (providing for venue in “a judicial district in which a

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- (b) which such person resides, is found, has an agent, or transacts his affairs. In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

⁸ Plaintiff’s also assert that by deposing the non-Pennsylvania residents they may discover that some of these defendants’ actions, such as telephone calls, faxes, etc., occurred in this district. This assertion is only speculation.

substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated”). Additionally, common sense suggests that it would be preferable to inconvenience the two Pennsylvania defendants instead of the ten defendants who live in New Jersey.

Title 28 U.S.C. § 1406(a) provides district courts with the discretion to transfer cases in the interest of justice: “The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.” Given that the majority of the defendants and the property out of which plaintiffs’ claims arose are situated in New Jersey, the District of New Jersey is the most appropriate venue for this action. I will grant defendants’ motion to transfer.

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ORDER

AND NOW, this day of January 2003, after consideration of defendants' motions and plaintiffs' responses thereto, defendants' motion to dismiss for lack of subject matter jurisdiction is DENIED. Defendants' motion to transfer is GRANTED and the action is TRANSFERRED to the United States District Court for the District of New Jersey.

THOMAS N. O'NEILL, JR., J.